

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS PABLO BERLANGA,

Defendant-Appellant.

UNPUBLISHED

February 24, 1998

No. 193355

Tuscola Circuit Court

LC No. 94-006568-FC

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, and conspiracy to commit assault with intent to commit murder, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to concurrent terms of seventeen and a half to thirty-five years' imprisonment for the assault conviction and fifteen to thirty years' imprisonment for the conspiracy conviction. We affirm.

Defendant first argues that there was insufficient evidence to convict him of conspiracy. We do not agree. There was evidence that (1) defendant and his two coconspirators were in a gang together; (2) the attitudes of all three changed toward the complainant just before the assault; (3) all three met on the roof before asking the complainant to join them; (4) one passed a claw hammer to the complainant with instructions to pass it to defendant directly before the assault; and (5) the coconspirators made statements about killing the complainant as he was being assaulted with the hammer by defendant. Based on the above evidence, and drawing every inference in the prosecution's favor, there was sufficient evidence for the jury to find that defendant's two coconspirators planned with him to kill the complainant and to find defendant guilty beyond a reasonable doubt of conspiracy to assault with intent to murder. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

Defendant next argues that the trial court abused its discretion by admitting, as evidence of motive, testimony regarding a shooting attended by defendant, his two coconspirators and the complainant the night before the instant assault. Defendant argues that it was irrelevant and prejudicial.

This argument is without merit. Evidence that directly impacts some element or material issue in a case can be admitted. MRE 401; MRE 402. A material fact need not be an element of a crime or cause of action or defense but it must at least be “in issue” in the sense that it is within the range of litigated matters in controversy. *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995). While motive is not an element of either crime charged, it is a material issue that tends to make the commission of the assault more probable. This evidence was not unfairly prejudicial, since both defendant and the complainant witnessed the shooting together.

Defendant also argues that the trial court abused its discretion by upwardly departing from the sentencing guidelines after defendant withdrew a guilty plea and exercised his right to a jury trial, and by imposing a sentence that was retaliatory. This argument is without merit. A presumption of vindictiveness for an increased sentence is reserved to cases where there is a “reasonable likelihood” that the increase is due to actual vindictiveness. *Alabama v Smith*, 490 US 794, 799; 109 S Ct 2201; 104 L Ed 2d 865 (1989). “[W]hen a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial.” *Id.* at 801. This is the situation facing defendant, so there is no presumption of vindictiveness and defendant failed to make a showing of actual vindictiveness.

Finally, defendant argues that the sentence was disproportionate. A trial court is not required to stay within the sentencing guidelines, and may depart where, in their judgment, the recommended range is disproportionate, in either direction, to the seriousness of the crime. *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). Where the court departs, it must articulate its reasons on the record at sentencing and in the sentencing information report. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). The trial court upwardly departed from the guidelines presumptively proportionate range by two years, six months, stating that it did not think it had “ever seen a case that came closer to a first degree murder than this one.” This is an adequate explanation for the trial court’s determination that this crime rose to the level of seriousness warranting departure from the guidelines by two and one-half years. The mitigating factors of defendant’s young age and lack of prior convictions do not prevent a judge from sentencing at the maximum level under the guidelines or even departing upward, since the primary consideration in sentencing is whether the sentence imposed is proportional to the seriousness of the offense when considered in conjunction with the particular defendant. *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471(1995).

We affirm.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Hilda R. Gage